Supreme Court, U.S.
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No. 10-974

In the

Supreme Court of the United States

BURLINGTON BASKET COMPANY,
Petitioner,

v.

PAMELA S. NEWBERRY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of the Supreme Court's decision in *Gross v. FBL Financial Services*, 129 S.Ct. 2343, 174 L.Ed. 2d 119, (2009), the Court of Appeals was correct in construing the ADEA and the Iowa Civil Rights Act within the same analytical framework.

2. Whether the Court of Appeals' decision in this case is in conflict with the decision of the Iowa Supreme Court in *DeBoom v. Raining Rose*, 772 N.W.2d 1 (Iowa 2009). by deciding that the use of the term "motivating factor" alone is sufficient to establish liability in a pretext age discrimination case in the absence of a corresponding instruction that the Plaintiff must prove that the Employer's actions constituted pretext.

3. Whether, by affirming the district court's jury instructions under Iowa law, the appellate court has concluded that a "motivating factor" jury instruction, even though incorrect under the ADEA, need not be accompanied by a jury instruction on pretext in an ADEA case. Because of a split between the circuits, petitioner submits that this is a decision that it is more appropriate for this Court to make.

LIST OF PARTIES

Pursuant to Rule 14.1(b) the parties to this proceeding have been omitted since all the parties are listed on the cover page.

CORPORATE DISCLOSURE STATEMENT

The Burlington Basket Company is a privately held corporation and there is no public ownership of its corporate stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. INTRODUCTION 2

B. NEWBERRY V. BURLINGTON BASKET COMPANY 3

C. THE JURY INSTRUCTIONS 4

REASONS FOR GRANTING THE WRIT 6

1. The Court of Appeals was not correct in construing the ADEA and the Iowa Civil Rights Act within the same analytical framework in existence prior to Gross, and then deciding that while the instructions under Gross were incorrect, the jury

instructions "defaulted" into a correct statement of Iowa law. 6

2. Whether the Court of Appeals' decision in this case is in conflict with the decision of the Iowa Supreme Court in *DeBoom v. Raining Rose*, 772 N.W.2d 1 (2009), by deciding that the use of the term motivating factor alone is sufficient to establish liability in a pretext age discrimination case in the absence of a corresponding instruction that the Plaintiff must prove that the Employer's actions constituted pretext. 8

3. Whether, by affirming the district court's jury instructions under Iowa law, the appellate court has decided that a jury instruction on pretext is not required in an ADEA case, and this is a decision to be made by this Court, because there is a split amongst the circuits as to whether or not a pretext instruction is required in a federal age discrimination claim. 11

A. The First, Seventh, Eighth and Eleventh Circuits have decided that a pretext jury instruction is not required. 11

B. The Second, Third, Fifth and Tenth Circuits have decided that a pretext jury instruction is required. 12

CONCLUSION 14

APPENDIX

Appendix A: Opinion, United State Court of Appeals for the Eighth Court, (September 28, 2010) 1a

Appendix B: Order Denying Motions for Judgment Nov and New Trial and Setting Attorney Fees, In the United States District court for the Southern District of Iowa, Davenport Division, (August 14, 2009) 13a

Appendix C: Judgment in a Civil Case, United States District Court, Southern District of Iowa, (June 18, 2009) 17a

Appendix D: Order Denying Motion for Summary Judgment, In the United States District court for the Southern District of Iowa, Davenport Division, (January 30, 2009) 19a

TABLE OF AUTHORITIES

CASES

Alvarez v. Des Moines Bolt Supply Inc.,
2010WL 4629463 (Nov. 17, 2010) 8

Cabrerea v. Jakabovitz,
24 F.3d 372 (2d Cir. 1994) 12

Conroy v. Abraham Chevrolet-Tampa, Inc.,
375 F.3d 1228 (11th Cir. 2004) 12

DeBoom v. Raining Rose,
772 N.W.2d 1 (Iowa 2009) . . . . . *passim*

Evans v. City of Bishop,
238 F.3d 586 (5th Cir. 2000) 13

Fed Express Corp. v. Holowecki,
552 U.S. ___, 128 S.Ct. 1147, 170 L. Ed. 2d 10 7

Fite v. Digital Equip. Corp.,
252 F.3d 3 (1st Cir. 2000) 11

Gehring v. Case Corp.,
43 F.3d 340 (7th Cir. 1994) 12

Gross v. FBL Fin. Servs.,
129 S.Ct. 2343, 174 L.Ed. 2d 119 (2009) 2, 4, 6, 7

Gross v. FBL Servs. Inc,
588 F.3d 614 (8th Cir. 2009) 8, 9, 10

King v. United States,
553 F.3d 1156 (8th Cir. 2009) 6

Moore v. Robinson Fire Prot. Dist.,
249 F.3d 786 (8th Cir. 2001) 12

Price Waterhouse v. Hopkins,
490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 2d 268
(1987) 2

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133, 120 S.Ct. 2097,
147 L.Ed.2d 105 (2000) 9, 13

Smith v. Borough of Wilkinsburg,
147 F.3d 272 (3d Cir. 1998) 12

Townsend v. Lumbermens Mut. Cas. Co.,
294 F.3d 1232 (10th Cir. 2002) 12, 13

STATUTES

28 U.S.C. 1254(1) 1

Age Discrimination in Employment Act ..... *passim*
29 U.S.C. 623(a) 1, 2

Iowa Civil Rights Act of 1965 ..... *passim*
Iowa Code Sec. 216.6(1)(a)(2003) 1, 7
Iowa Code Sec. 216.6(1)(a)(2010) 8

RULES

Eighth Circuit Manual of Model Civil Jury
Instructions 5.96 2008 7

The Burlington Basket Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eight Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 2010 WL 3746346 and is reproduced in the Appendix herein at 1a.

JURISDICTION

The judgment of the court of appeals was issued on September 28th, 2010. Pet. App. 17a. No rehearing was requested. this Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. Sec. 623(a) provides;

Prohibition of Discrimination.

(a) Employer practices - It shall be unlawful for an employer—
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

The Iowa Civil Rights Act of 1965, Iowa Code Sec. 216.6(1)(a)(2003) states:

Unfair employment practices.

It shall be an unfair or discriminatory practice for any:
Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation.

STATEMENT

A. INTRODUCTION

The basis for jurisdiction of the court of the first instance, the district court for the Eighth circuit for the southern district of Iowa, is a federal question based upon 29 U.S.C. 623(a), the Age Discrimination in Employment Act. Petitioner seeks review of the judgment of the Court of Appeals for the Eighth Circuit.

This case is the first of the *Gross v. FBL Financial Services,* 129 S.Ct. 2343, 174 L.Ed. 2d 119, *(2009)* progeny, and the line is not off to a good start. In *Gross*, this Court held that the "mixed motive" analysis adapted from Title VII and *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 2d 268 (1987), were not applicable in an ADEA claim. This Court held, among other things, that the burden of persuasion does not shift to the defendant in an ADEA claim. *Gross* at 2349. Moreover, this Court has held that a plaintiff must establish that an

employer took adverse employment action "because of" the age, thereby establishing the "but for" causation of their claim. *Id.*

The Court of Appeals decision in this case creates three questions which necessitate review. The first question is whether the same analytical framework applies to both the ADEA and the Iowa Civil Rights Act in deciding whether Burlington Basket company discriminated against the Pamela Newberry, and thus directly contradicts this Court's decision in *Gross*.

The second question is whether the Appellate Court's decision is in direct contravention of the Iowa Supreme Court decision in *DeBoom v. Raining Rose*, 772 N.W.2d 1 (Iowa 2009).

The third question is whether, by affirming the district court's jury instructions under Iowa law, the appellate court has decided that a "motivating factor" jury instruction, even though incorrect under the ADEA, need not be accompanied by a jury instruction on pretext in an ADEA case. This third question is a question that should be decided by this Court, as there is a split amongst the circuits as to whether or not a pretext instruction is required in a federal age discrimination claim.

B. NEWBERRY V. BURLINGTON BASKET COMPANY

This case began as a garden-variety age discrimination claim. Newberry worked for Burlington Basket Company, a family owned business, since 1995 until her termination on February 14, 2007. Pet. App. 2a. Newberry worked through a series of different jobs

and her last position was the Company Shipping Coordinator, to which she was promoted in 2004. *Id.* When Burlington Basket began to run into severe financial difficulties, which continue to this day, the Company decided to implement a reduction in force. Pet. App. 3a. Chris Thompson, the Company Controller and son of the CEO recommended that Newberry be terminated, although he did not have decision making authority to do so. *Id.*

Newberry filed suit alleging a violation of the Age Discrimination in Employment Act and the Iowa Civil Rights Act. Pet. App. 3a. At trial in June 2009, Newberry presented no direct evidence of discrimination. Newberry presented evidence that Chris Thompson was biased against older workers and gave preferential treatment to younger employees. *Id.* Burlington Basket alleged that Newberry was the least qualified of the employees eligible for a reduction in force, and Newberry rebutted Burlington Basket Company's evidence with testimony from former supervisors regarding her qualifications and positive evaluations from her personnel file. *Id.* Newberry was allowed to argue to the jury that the Basket Company's basis for termination was a pretext for age discrimination. The jury found in favor of Newberry, awarding her 25, 000.00 for emotional distress and nothing for wages. Pet. App. p. 7a.

C. THE JURY INSTRUCTIONS.

On post trial motions the Burlington Basket moved for JNOV and a new trial arguing that in light of *Gross v. FBL Financial Services,* 129 S.Ct. 2343, 174 L.Ed. 2d 119, (2009), which was decided the same day the jury was given the case, that the jury instruction was

incorrect. Pet. App. 4a. The district court instructed the jury that the plaintiff's age was "a determining factor" if her age "played a part" in Burlington Basket Company's decision to terminate her. The district court denied the post-verdict motions. Pet. App. 4a, 15a.

On appeal, the Eighth circuit court of appeals held that indeed the jury instructions were incorrect under *Gross*. Pet. App. 5a. However, the Appellate Court held that since the district court could formulate jury instructions for state and federal claims under Eighth circuit precedent prior to Gross, the jury instructions under the ADEA, while admittedly deficient, were "virtually identical" to Iowa law, given the Iowa Supreme Court decision in *DeBoom v. Raining Rose*, 772 N.W.2d 1 (Iowa 2009). pet. App. 5a-6a. The appellate court determined that since Newberry v. Burlington Basket was not a "mixed motive" case, but rather a "pretext" case, Burlington Basket suffered no prejudice since liability was imposed under the ICRA, even if the instructions were not correct under the ADEA. Pet. App. 5a.

The Appellate Court also upheld the award of attorney's fees in the case, which are not at issue in Burlington Basket Company's petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. **The Court of Appeals was not correct in construing the ADEA and the Iowa Civil Rights Act within the same analytical framework in existence prior to Gross, and then deciding that while the instructions under Gross were incorrect, the jury instructions "defaulted" into a correct statement of Iowa law.**

The Eighth Circuit Court of Appeals held:

> Consistent with our precedent prior to the Supreme Court's decision in Gross, the district court formulated a single set of jury instructions to cover both claims, and made no distinction between federal and state law.

Pet. App. 4a. *citing to, King v. United States*, 553 F.3d 1156, 1160 (n.3) (8th Cir. 2009). Footnote 3 in *King* states: "Because the same analysis applies to age discrimination claims under the ADEA and the ICRA, we do not separately discuss King's claim under the ICRA." *Id.*

At the time of the Appellate Court ruling on September 28, 2010, the Court of Appeals obviously understood the holding by this Court in Gross: the burden of persuasion never shifts in a mixed motive or pretext discrimination claim, and that the Plaintiff's burden under the ADEA is to prove that "but-for" the employee's age the adverse employment decision would not have occurred. *Gross v. FBL Fin. Servs.*, 129 S.Ct. 2343, 2350, 174 L.Ed. 2d 119 (2009).

The analysis under the Iowa Civil Rights Act is far different. As the court of appeals stated: "Although the Iowa General Assembly has not amended the ICRA to change its long-standing "because of" standard to a "motivating factor" standard, we are of course bound to apply the Iowa court's statement of Iowa law in evaluating Newberry's state-law claim." Pet. App. 6a. Moreover, Newberry did not present any jury instructions which reflected a violation of the Iowa Civil Rights Act. Newberry's proposed jury instructions were based upon the Federal ADEA model instructions and a Title VII "motivating factor" instruction (Eighth Circuit Manual of Model Civil Jury Instructions 5.96 2008). Pet. App. 6a.

While the conflict between the Appellate Court decision and that of a state court of last resort is discussed further below, the Plaintiff's ADEA claim, while different from the State law claim, apparently disappears, since the Court decided that there was no prejudice to Burlington Basket Company by having an incorrect instruction under the ADEA. When conducting statutory interpretation, the Court "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination. *Gross*, 129 S.Ct. 2343 at 2344, citing to *Fed Express Corp. v. Holowecki*, 552 U.S. ___.___ 128 S.Ct. 1147, 1153, 170 L. Ed. 2d 10, 17. The fact that faulty jury instructions under the ADEA appear to satisfy the Iowa Civil Rights Act equates to a jurisprudential dartboard, whereby the Plaintiff manages to hit the mark because of legal mistakes, rather than legal analysis.

The more obvious, and broader issue, is that this Court has held that ADEA claims are determined

under the standards set forth in *Gross*, and warrant a different analysis than Iowa state claims modeled after Title VII. The court of appeals recognized this fact in *Alvarez v. Des Moines Bolt Supply Inc.*, 2010WL 4629463 (Nov. 17, 2010), wherein the appellate court recognized that federal and state discrimination claims may not have the same analysis, *citing DeBoom v. Raining Rose,* 772 N.W.2d 1 (Iowa 2009). *Alvarez*, 2010 WL 4629463, n. 2. (emphasis supplied). The conflict arises wherein the court of appeals followed its own pre-Gross precedent in providing the same analysis of federal and state claims in the present case, but relied upon the difference in federal and state discrimination claims in *Gross v. FBL Servs. Inc*, 588 F.3d 614, (8th Cir. 2009), and again in *Alvarez*.

2. **Whether the Court of Appeals' decision in this case is in conflict with the decision of the Iowa Supreme Court in *DeBoom v. Raining Rose*, 772 N.W.2d 1 (2009), by deciding that the use of the term motivating factor alone is sufficient to establish liability in a pretext age discrimination case in the absence of a corresponding instruction that the Plaintiff must prove that the Employer's actions constituted pretext.**

DeBoom v. Raining Rose, 772 N.W.2d 1 (Iowa 2009) is the reigning pronouncement of age discrimination cases in Iowa. The Iowa Civil Rights Act makes it illegal to discriminate "because of" various factors, including the age of an employee. Iowa Code Sec. 216.6(1)(a)(2010). The Iowa Supreme Court has determined that age discrimination, which is included in the Iowa Civil Rights Act, is subject to the same Title VII analysis as race, sex, gender and disability.

"When interpreting discrimination claims under Iowa Code chapter 216, we turn to federal law, including Title VII of the United States Civil rights Act and the Americans with Disabilities Act." *...citations omitted*, *DeBoom v. Raining Rose*, 772 N.W.2d at 7 (Iowa 2009). *DeBoom* was a pretext case, wherein the Plaintiff alleged circumstantial evidence of pregnancy discrimination leading up to the employee's eventual termination.

One of the primary issues in *DeBoom* was the Iowa district court's failure to instruct the jury on the issue of pretext. *DeBoom* at 9. A pretext instruction, under the Iowa Civil Rights Act, states that a jury may infer intentional discrimination if it disbelieves the employer's asserted reasons for terminating the employee. *Id.* The absence of a pretext instruction constituted reversible error and warranted a new trial for DeBoom. Quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 2108, 147 L.Ed.2d 105, 120 (2000), the Iowa Supreme Court held: "[T]hus, we hold a pretext instruction is required where, as here, a rational finder of fact could reasonably find the defendant's explanation false and could infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."

Newberry v. Burlington Basket Company did not contain <u>any</u> jury instruction regarding pretext. If, as the Appellate Court found, the modified Newberry jury instructions were insufficient under *Gross* but satisfied Newberry's Iowa Civil Rights claim under *DeBoom*, then those instructions needed to inform the jury that Newberry's age was a motivating factor in the Basket Company's decision to terminate her if it was proven

by a preponderance of the evidence that its stated reasons for the decision are not the real reason, but are a pretext to hide sex discrimination.

Without a pretext instruction, the instructions in Newberry are in conflict with the Iowa Supreme Court decision in *DeBoom v. Raining Rose*: the court of appeals decided that the instructions were sufficient under the Iowa Civil Rights Act, (Pet. App. 7a) when in fact, without a pretext instruction, under Iowa law a new trial is warranted.

In *Gross v. FBL Financial Services Inc.* 588 F.3d 614 (8th Cir. 2009), the appellate court correctly rejected Plaintiff Gross' argument that a violation of the Iowa Civil Rights Act occurs if the jury believes that age was a "motivating factor" even if the jury finds that the employer would have taken the same adverse action in the absence of an impermissible motive. 588 F.3d at 618. The Appellate Court rejected Plaintiff Gross' argument because it: 1) ignored the mixed motive framework still employed in the Iowa Civil Rights Act; 2) was an interpretation in conflict with the Iowa Supreme Court opinion in *DeBoom v. Raining Rose*; and 3) didn't apply because *DeBoom* was a "pretext case" and not a mixed motive case, wherein the employer presented a non-discriminatory reason for terminating the plaintiff and the plaintiff was given the opportunity to argue that the employer's reason was a pretext for pregnancy discrimination. *Gross*, 588 F.3d at 618-620 (2009). The result in Newberry is precisely the argument advanced by Plaintiff Gross on remand, and which was rejected by the appellate court. Consequently, the appellate court's decision is at odds with its own prior decision in *Gross v. FBL Financial Servs., Inc.* 588 F.3d 614 (2009), as

well as the decision of the Iowa Supreme Court in *DeBoom*.

3. Whether, by affirming the district court's jury instructions under Iowa law, the appellate court has decided that a jury instruction on pretext is not required in an ADEA case, and this is a decision to be made by this Court, because there is a split amongst the circuits as to whether or not a pretext instruction is required in a federal age discrimination claim.

A. The First, Seventh, Eighth and Eleventh Circuits have decided that a pretext jury instruction is not required.

DeBoom v. Raining Rose held: We find the courts requiring a pretext instruction more convincing. A pretext instruction is necessary because discrimination cases are difficult to prove. *DeBoom* at 10. By holding that the instructions in Newberry were deficient pursuant to *Gross* but sufficient pursuant to *DeBoom*, the federal court has decided that a pretext instruction is not required in the Eighth Circuit post-*Gross*, and this is a question for the Supreme Court based upon the split amongst the several circuits.

The issue is not whether the actual word "pretext" is used, but rather, whether the jury should be told that the Plaintiff must establish that the reason articulated by the employer is not real reason for the adverse action.

In *Fite v. Digital Equipment Corp.*, 252 F.3d 3, 7 (1st Cir. 2000), the court held that a jury instruction on

pretext, while permitted, would not be compulsory. The Eighth circuit has expressed doubts as to whether it would ever be reversible error on a failure to give a pretext instruction. *Moore v. Robinson Fire Prot. Dist.*, 249 F.3d 786, 790 n. 9 (8th Cir. 2001). The Seventh Circuit, critical of instructions using words such as pretext, held in *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994) that such use is not required. The Eleventh Circuit, equally critical of the use of such an instruction, does not find the absence of the term pretext to be reversible error. *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1233-34 (11th Cir. 2004).

B. The Second, Third, Fifth and Tenth Circuits have decided that a pretext jury instruction is required.

The Second circuit in *Cabrerea v. Jakabovitz*, 24 F.3d 372 (2d Cir. 1994), held that a jury must be told that if they find the elements of the prima facie case, they may disbelieve the defendant's explanation for the adverse action taken (in this case, housing discrimination). *Id.* at 382. The court of appeals for the Second circuit, while critical of legalistic language, recognized that the jury must be instructed that the burden of persuasion stays with the plaintiff in proving that the reason for the employer's adverse action is a pretext for discrimination.

Likewise, *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 280 (3d Cir. 1998) and *Townsend v. Lumbermens Mut. Cas. Co.* 294 F.3d 1232, 1241 (10th Cir. 2002) both ascribe to the view that ..."[I]n cases such as this, a court must instruct jurors that if they disbelieve an employer's proffered explanation they

may-but need not-infer that the employer's true motive was discriminatory." *Id.* In following this court's decision in *Reeves v. Sanderson Plumbing Prods.*, the Fifth circuit has also held that the trier of fact may infer the ultimate fact of discrimination from the falsity of the employer's explanation. *Evans v. City of Bishop*, 238 F.3d 586, 591 (5th Cir. 2000).

The question of whether or not the trier of fact must be instructed on pretext is a critical one. As the courts continue to struggle with Gross and "but-for" causation, both plaintiffs and defendants will seek to request (or to avoid) a pretext instruction based upon the particular facts of each claim. In this instance, Burlington Basket argues that if the motivating factor instruction was used in a pretext case (as it was decided under the ICRA) then it was up to the trier of fact to determine whether Newberry's termination was pretext or not. Now that it is unquestioned that under *Gross* the plaintiff always retains the burden of persuasion, it is necessary that the question of whether a pretext instruction is required should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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